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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 536th MEETING

Held at Headquarters, New York,
on Friday, 10 June 1994, at 10 a.m.

Chairman: Mr. MORAN (Spain)

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94-80944 (E)

The meeting was called to order at 10.15 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/XXVII/CRP.2 and Add.1-3)

1. The CHAIRMAN invited the members of the Commission to continue with the adoption of the report of the drafting group and to inform him whether they agreed to the proposal to replace the expression "minimum level" in articles 41 sexies bis and 41 sexies quater (A/CN.9/XXVII/CRP.2/Add.2) with the word "threshold".

2. Mr. JAMES (United Kingdom) said that his delegation was ready to accept that proposal and, with the exception of that modification, was in favour of retaining articles 41 sexies bis, 41 sexies ter and 41 sexies quater as contained in document A/CN.9/XXVII/CRP.2/Add.2.

3. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt document A/CN.9/XXVII/CRP.2/Add.2, the only modification being the replacement of the words "minimum level" by "threshold".

4. Mr. HERRMANN (Secretary of the Commission) suggested replacing the title of chapter III bis as contained in document A/CN.9/XXVII/CRP.2/Add.1 ("Special method for procurement of services") with "Principal method for procurement of services". That change would make it clearer that what was meant by "procedures for alternative methods of procurement" (chap. IV) was methods other than the principal method, i.e., in the procurement of goods and construction, alternatives to tendering (chap. III) and, in the procurement of services, alternatives to the method referred to in chapter III bis.

5. Mr. JAMES (United Kingdom), Mr. LEVY (Canada), Mr. CHATURVEDI (India), Mr. GRIFFITH (Observer for Australia), Mr. GOH (Singapore) and Mr. SHI Zhaoyu (China) supported the Secretary's proposal.

6. The CHAIRMAN invited the Commission to turn to document A/CN.9/XXVII/CRP.2/Add.3, which contained a footnote concerning article 16, on methods of procurement, and chapter V, which dealt with review.

7. Mr. LEVY (Canada) said that his delegation fully endorsed the document. He wished to know whether, in the version of the Model Law that would appear in the Commission's report, articles would be renumbered in order to avoid the use of bis, ter, quater, quinquies and so forth.

8. Mr. HERRMANN (Secretary of the Commission) said that that would be the case. He also wished to inform delegations that the final version which would appear in the Commission's report would be an edited version for all six languages. In the future, then, they should therefore refer to that version and not to the texts that would be distributed to them at the end of the session.

9. Mr. CHATURVEDI (India) noted that his delegation had expressed reservations on a number of clauses during the debate on chapter V. He hoped that they would

be reflected in the report. Since the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services was not ready for publication, he wished to know whether a footnote referring to that fact could be inserted.

10. Mr. GRIFFITH (Observer for Australia) asked whether, in the final version, chapter III bis would be retained, so that the numbering of the other chapters would correspond to the chapters of the Model Law on Procurement of Goods and Construction, or whether the chapters would be renumbered beginning with chapter III. He would favour the second option.

11. The CHAIRMAN replied that it would be preferable to renumber the chapters. If there were no other remarks, he would take it that the Commission wished to adopt document A/CN.9/XXVII/CRP.2/Add.3.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section B (continued)

12. Mr. HOLTZMANN (United States of America), referring to section B of the annotated check-list (A/CN.9/396/Add.1, chap. III), said that, while it was important that any objections as to the jurisdiction or composition of the arbitral tribunal should be raised as soon as possible, before the proceedings had gone too far, it would not be advisable to raise those two matters at a preparatory conference for several reasons, of which the most important was incompatibility with the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration.

13. With regard to objections to the composition of the arbitral tribunal, both the Regulations and the Model Law specified that any party that wished to challenge an arbitrator must do so within 15 days after becoming aware of any grounds for challenge. If the party had been aware of the grounds prior to the preparatory conference, it could not then wait until the conference to act unless that took place within the 15 days, which would be purely coincidental. On the other hand, a party which at the preparatory conference waived its right to make a challenge and which subsequently discovered grounds for challenge should not be deprived of its right to take advantage of the 15-day period provided for in the Arbitration Rules and the Model Law, or of any other period of time provided for under other rules or national law.

14. With regard to objections as to the jurisdiction of the arbitral tribunal, under the UNCITRAL Arbitration Rules the delivery to the respondent of a simple notice of arbitration sufficed for the arbitral proceedings to be deemed to have commenced, and the statement of claim could be delivered to the respondent within a period of time - several weeks or even several months - determined by the arbitral tribunal, which also determines the period of time within which the respondent must deliver his statement of defence. In practice, however, those time periods were often determined in consultation with the parties during the preparatory conference. It would therefore be entirely inappropriate to ask whether a party had an objection as to the jurisdiction of the arbitral tribunal even before that party was in possession of the statement of claim itself and

the complete file. Moreover, under the Arbitration Rules and the Model Law, a plea that the arbitral tribunal did not have jurisdiction must be raised not later than in the statement of defence. To ask the parties at the preparatory conference whether they had any objection as to jurisdiction would thus be tantamount not only to asking them to take a decision before they had all the necessary information, but also to shortening the time-limits for arbitration established by UNCITRAL itself.

15. Mr. BONELL (Italy) said that he fully endorsed the remarks by the representative of the United States of America. Like the representative of Thailand, he believed that the question of the tribunal's jurisdiction should not be taken up in the context under discussion, and he recalled that article 16, paragraph 2, of the Model Law provided that "a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings". The matter therefore could be raised either early in the proceedings or later on, depending on the particulars of the case. The role that preparatory conferences could play must not be overestimated. They were definitely not the appropriate forum for a discussion of the applicable law or of the value of arbitration ex aequo et bono.

16. Mr. ABASCAL ZAMORA (Mexico) said that he agreed with the arguments advanced by the representative of Italy; the check-list should cover situations in which a party challenged the jurisdiction of an arbitrator and requested that he should decline to hear the case. A party might introduce such a challenge when preparing its defence, which was why the question should be included in the check-list of topics for discussion. The decision to do so should be left to the parties and not to the members of the arbitral tribunal, even in consultation with the parties, in order to prevent a counter-claim.

17. Mr. CHATURVEDI (India) agreed that the question of jurisdiction should not be included in the check-list. The parties, and not the arbitrators, should raise the question, and they could do so at any point in the proceedings.

18. Mr. TUVAYANOND (Thailand) said that under articles 12 and 13 of the Model Law, the parties were free to challenge the composition of the arbitral tribunal at any time, and not only during a period of 15 days. The 15-day period began only once the grounds for challenge were known. Once the parties were aware of those reasons, whether at the time of the tribunal's constitution of the tribunal or in the course of the arbitral proceedings, they were free to raise objections. There was no reason to deny them the opportunity to do so during a preparatory conference. Although the Guidelines stipulated that any problems arising in that regard should be addressed early in the proceedings, the question of the tribunal's "mandate" required clarification. A preparatory conference provided an opportunity to raise objections to an interpretation that supposedly ran counter to the arbitrators' mandate as understood by the parties. The concept of jurisdiction was only vaguely dealt with in the Guidelines. The jurisdiction of the arbitral tribunal should be clearly spelt out in the arbitration agreement. The matter should not be dealt with in the part of the text under discussion.

19. Mr. HERRMANN (Secretary of the Commission) said that the distinction drawn by the representative of Thailand between "mandate" and "jurisdiction" was more a matter of terminology than of substance. Under the UNCITRAL Model Law and Arbitration Rules, the jurisdiction of the arbitrators to settle the dispute derived directly from the arbitration agreement. The arbitration agreement must apply to the dispute before the tribunal and that explained how the "mandate", which was covered by the notion of "competence", came into play. The objective of section B, in his view, was simply to determine whether the arbitrators were in fact arbitrators and not merely three persons who were not involved in the dispute, i.e. whether the arbitrators had been selected by the parties to settle the dispute. A second aspect of the notion of "mandate" had been alluded to by the representative of Italy when he had quoted article 16, paragraph 2, of the Model Law. If at a later stage in the proceedings a party believed that a matter raised during the discussion fell outside the scope of the arbitration agreement and that the tribunal therefore lacked jurisdiction, or was not mandated, to rule on the matter, it would be perfectly normal for that party to challenge the jurisdiction of the arbitrators. In general, however, such situations arose only very late in proceedings and there was therefore no need to deal with them at preparatory conferences. A number of speakers, including the representative of Thailand, had stated that the parties should not be prevented from taking up certain topics during preparatory conferences. However, those were topics which the arbitral tribunal might automatically raise, and it was inconceivable that the tribunal would challenge its own jurisdiction. Accordingly, he believed that, while it was not necessary to include the topic in the agenda, that did not prevent the parties from raising it. To prohibit a topic from being raised on the grounds that it was not on the agenda seemed an excessively formal approach.

20. The notion of an objection to the composition of the arbitral tribunal had nothing to do with the concept of challenge proceedings. Section B was concerned with the method of appointing the arbitrator and definitely not with the arbitrator's impartiality or jurisdiction. The objective was to determine whether the arbitrator had in fact been designated by the competent authority and whether all the formal requirements had been met. The intent definitely was not to take up matters dealt with in articles 12 to 14 of the Model Law.

21. Mr. TUVAYANOND (Thailand) said that the mandate - or jurisdiction - of the arbitral tribunal normally was set out in the arbitration agreement. It was difficult to understand why a party would oppose a provision it had itself accepted. It would, of course, be useful to raise any issue that might arise with respect to the jurisdiction or mandate of the arbitral tribunal, but only for purposes of clarification and not by way of objection. To authorize one party to raise an issue that was not included in the agenda was unfair to the party that, caught unawares, would be obliged to improvise while the other would have had time to prepare its case. In the case of the appointment of the arbitrators, while an objection could be raised if irregularities had occurred, it was also possible to challenge the arbitrators themselves at any time after their appointment, provided that no more than 15 days had passed since the grounds for the objection had become known.

22. Mr. CHOUKRI SBAI (Morocco) said that arbitration rules customarily dealt with the concept of mandate or jurisdiction and with the means for determining

the composition of the arbitral tribunal. The arbitration agreement defined that mandate. Section B should be drafted in more neutral language, indicating, for example, that a party might have good reasons to raise the issue of the tribunal's composition if it had doubts or objections in that regard. It was important to avoid making a value judgement by stating that an objection was likely to cause delays or cast doubt on the tribunal's jurisdiction.

23. Mr. HERRMANN (Secretary of the Commission) said that delegations appeared to be labouring under a misapprehension which was the result of poor drafting. The first sentence under "Remarks" in section B ("... may not always be desirable") applied to the arbitral tribunal. It definitely did not apply to the behaviour of either party, about whom no value judgement was made. The section was simply intended to draw attention to the advantages or disadvantages of a particular method, as had been done throughout the Guidelines.

24. Mr. GOH (Singapore) agreed with the representative of the United States of America: the question of objections should not be included in the annotated check-list. Arbitration began when the parties designated the arbitrators. By the time a preparatory conference was convened the proceedings had already been under way for some time, and any objection as to the jurisdiction of an arbitrator should already have been raised.

25. Mr. GRIFFITH (Observer for Australia) said that he, too, believed it would be best to delete section B or to use much less precise language - indicating, for example, that the tribunal should inquire whether both parties accepted its composition. Arbitration Rules included procedures for challenging the Tribunal's composition and the parties should not be encouraged to raise objections in that regard.

26. Mr. JONKMAN (Observer for the Permanent Court of Arbitration) said that the framework of the discussion should be clarified. If the Commission was dealing with guidelines whose purpose was to offer suggestions to the parties so that they could plan the arbitration as efficiently as possible, then it really would be best not to include the matter in the agenda or deal with it at all in the document. However, if what was intended was a simple memorandum, a list of questions that might eventually arise, then it might be useful to retain that matter.

27. Mr. HERRMANN (Secretary of the Commission) said that it was his understanding that the purpose of the check-list was not to present a neutral list of all situations that might arise but rather to indicate the advantages and disadvantages of a given course of action and the risks it might entail. In that sense, the annotations it contained were guidelines.

28. Mr. HOLTZMANN (United States of America) said that the distinction between "mandate" and "jurisdiction" was artificial. In one possible scenario, for example, if the arbitration clause stipulated that an arbitral tribunal must settle the dispute on the basis of the domestic law of a particular country, any attempt to invoke the law of another country would be considered to be outside its "mandate". However, it might just as easily be asserted that it was outside the tribunal's jurisdiction to rule on the basis of the law of another country.

29. The notion of objections to the composition of the arbitral tribunal had not been intended to cover the notion of challenge. The problem could be resolved by not using the word "composition" or by clarifying its meaning. Clearly, if an arbitral tribunal was improperly constituted, i.e. if the persons serving as arbitrators had not been so designated in the arbitration agreement, then the question of the tribunal's jurisdiction arose. However, objections as to jurisdiction would be more appropriately considered under section D of the check-list, on defining issues and order of deciding them, rather than under section B. Lastly, the fact that a matter was not raised at the exact moment envisaged in the Guidelines should not prevent it from being raised at some other time pursuant to the arbitration rules or the applicable law. The point was to protect the parties from their own mistakes and to prevent disputes as to the jurisdiction or composition of the tribunal from arising at a later stage.

30. Mr. HERRMANN (Secretary of the Commission) said that his point had not been whether the fact that a party had not raised an objection at a preparatory conference would prevent him from doing so at a later stage, but simply whether a party would be prevented at a preparatory conference from raising a matter which was not on the agenda of the conference.

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

31. Mr. DUCHEK (Austria) said that it would be best to delete section B. As to whether the question of the applicable substantive law could be considered at the preparatory conference, he noted that the parties might raise the issue at that stage, when defining the points at issue (section D (i) of the check-list) or agreeing on undisputed facts or issues (section E), since in some situations facts might be relevant under the legislation of one country but not under the legislation of another. The question of the applicable law might arise when procedures were planned, and it might be helpful if the parties agreed on that point during the preparatory conference. The Guidelines should provide for that situation.

32. Mr. CHATURVEDI (India) said that it was the Commission's duty to draw up guidelines and not merely an indicative list; it should therefore proceed cautiously when considering a given section or deciding to retain it. With regard to section B of the check-list, the parties were free to decide whether they wished to take up the matter of the jurisdiction and composition of the arbitral tribunal, and they could do so at any time. However, it was in their interest to do so as early as possible in order to save time and money. On the other hand, it was not the task of the arbitrators to determine whether or not the question of the Tribunal's jurisdiction and composition should be raised. To prevent them from taking that initiative, it would be preferable to delete section B or amend it.

33. Mr. TUVAYANOND (Thailand) said that section B served a useful purpose and that the solution might be to rephrase it using the words "accept" or "approve". The arbitral tribunal must be able to seek clarifications concerning its mandate. With regard to the applicable substantive law, for example, even where the parties had selected a particular national law and there was thus no question of any objection to the applicable law, the arbitrators still might need to clarify for themselves whether they were dealing with the law in its

current form or as it had stood on a particular date. His delegation would agree to the deletion of section B provided that the questions of jurisdiction and the applicable law were covered under section D. The tribunal must be able to seek clarifications at the preparatory conference in order to avoid stalling tactics later on, which were costly for everyone.

34. Mr. SEKOLEC (International Trade Law Branch) said that the practitioners consulted by the secretariat believed that the question of the applicable substantive law could be dealt with under section D (i), but only for the purpose of deciding whether it should be considered at a later stage. Defining the applicable law and ascertaining whether there was agreement on the law to be applied were two different things. Furthermore, the issue was one on which the parties might wish to provide written submissions, a situation which could not be anticipated at a preparatory conference, which was concerned with procedure.

35. Mr. SHI Zhaoyu (China) said that section B should be retained and, if necessary, amended to reflect the views of delegations. The annotated check-list of possible topics for preparatory conferences should be as long as possible. The arbitral tribunal should also, where appropriate, be able to hear very early in the proceedings any objections by the parties as to its jurisdiction and composition. The parties, for their part, should be able to raise the question when they deemed it appropriate to do so.

36. Mr. OLIVENCIA (Spain) said that, however important it might be, the question of the arbitral tribunal's jurisdiction and composition should not be included in the agenda of a preparatory conference. Once an agenda had been drawn up listing the topics for discussion, there was no reason to address questions that were not on that agenda, and the tribunal itself should not propose an agenda that included the question as to whether the parties challenged its jurisdiction or composition.

37. A preparatory conference convened at the outset of the proceedings might be the appropriate time to determine whether the parties objected to the tribunal's jurisdiction or composition, but that initiative should be left to the parties. In so far as those were the issues that had to be settled first, the question of possible objections to them should be raised on a preliminary basis at a preparatory conference convened very early in the proceedings and, if there were no objections, that fact should be noted; the question should not, however, be specifically included in the agenda of the preparatory conference. Accordingly, his delegation proposed that section B should be amended to avoid giving the impression that the matter was an agenda item introduced by the arbitral tribunal.

38. His delegation viewed the Guidelines under discussion as a guide, along the lines of the UNCITRAL Legal Guide, the purpose of which was to provide and analyse information, describe the matter under consideration, record possible problems, weigh the pros and cons of different approaches, propose various options and, finally, recommend prudent courses of action. The Guidelines should be viewed as a tool for arbitrators, albeit one that was not binding and did not prejudge any given issue.

39. As to their scope, the Guidelines were clearly not intended to be used solely in the context of the UNCITRAL Arbitration Rules, international arbitration or the rules of arbitral institutions; they should be general in nature, although that did not preclude the possibility that, where the UNCITRAL Arbitration Rules were applied, the proceedings in question would be governed by specific provisions of those Rules.

40. His delegation therefore proposed that a working group should be established after the conference of the International Council for Commercial Arbitration to allow more time for a more thorough exchange of views on the draft guidelines.

41. Mr. BONELL (Italy) asked the Chairman to summarize the discussion as it had evolved.

42. The CHAIRMAN said that since the discussion was intended to be an exchange of views on the document prepared by the secretariat for the purpose of eliciting the opinions of delegations so that a more complete document could be submitted to the working group whose establishment had been proposed, the secretariat would be in a better position to summarize the discussion or, if necessary, to highlight those issues on which clarifications should be sought from delegations.

Chapter III, section C

43. Mr. LEVY (Canada) agreed that it would be useful to establish a working group, but wondered whether the fact that the Commission would have considered the document at its twenty-seventh session and stated its position on the matter might not hamper the working group's efforts.

44. His delegation had certain reservations regarding section C, for it encouraged an inexperienced arbitrator to assume the role of mediator, thereby running the risk of leading the parties into an unforeseen process or outcome. An arbitrator should not get involved in settlement matters. Accordingly, the section should state that the arbitrator should be kept informed of all the settlement proceedings but should not participate in them. It was inappropriate to raise the issue of settlement during the preparatory conference. However, since the continental European States took a different approach to the issue than did the United States of America, the United Kingdom, Canada and the Commonwealth countries, for example, short of simply deleting all the provisions in square brackets, the best solution would be, at the very least, to issue a stern warning against the dangers of that practice.

45. Mr. ABASCAL ZAMORA (Mexico) said that he agreed with the representative of Canada, pointing out that an arbitrator's role was different from that of a mediator. An arbitrator had the task of determining the truth, the content of the agreement between the parties and their behaviour and then of handing down the decision by which they must abide. The role of a mediator, on the other hand, was to try to understand the positions of the two parties and to get them to agree to a solution to their dispute. When an arbitrator became a mediator, he risked losing his impartiality and acquiring prejudices during the conciliation process, thereby compromising any future settlement.

46. Clearly, the best way for an arbitrator to encourage conciliation was to do his job as an arbitrator in such a way that the parties, recognizing that he was acting reasonably in his search for a solution, would be motivated to do likewise. In any event, while it must be acknowledged that the practice whereby arbitrators assumed the role of conciliators existed in many countries, it was necessary to warn of the dangers inherent in that practice.

The meeting rose at 1 p.m.

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Twenty-seventh session

SUMMARY RECORD OF THE 537th MEETING

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Chairman: Mr. MORAN (Spain)

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INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued)

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94-80960 (E)

The meeting was called to order at 3.10 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section B (continued)

1. Mr. GRIFFITH (Observer for Australia) said he felt that the time had come for the Commission to take some basic decisions, such as on whether or not to delete section B. It seemed that a majority of members of the Commission were in favour of deleting it, although some delegations had supported his own delegation's proposal to reword the section heading and redraft the remarks so as to make them more positive. His delegation was prepared to accept either of those two options but believed that, for the purposes of the conference which the International Council for Commercial Arbitration was to hold in November, it should be made clear whether the Commission had reached agreement on deleting the section.

Chapter III, section C

2. Mr. TUVAYANOND (Thailand) said that he was not in favour of deleting section C; it would be sufficient to make slight drafting changes, which could be entrusted to the Commission secretariat. It must be made clear that the function of the arbitral tribunal should not be confused with that of a mediator or a conciliator. However, the arbitral tribunal should be aware of the existence of discussions taking place outside the framework of the arbitration and should be informed of the results.

3. Mr. ANDERSEN (Denmark) said that the Commission should take a decision at the current session on the check-list of possible topics for preparatory conferences; there was no justification for convening a working group for that purpose.

4. Section C should remain unchanged. It was difficult to see what connection there was between having the arbitral tribunal inquire whether it was possible for the parties to settle a dispute and attributing to the arbitral tribunal the role of conciliator or mediator. The remarks concerning a possible confusion of functions actually referred to a different topic and should be deleted, or, in any event, included in a separate section. It should be borne in mind that not all countries had the same legal traditions or the same number of lawyers. Arbitral proceedings were costly and the parties might wish to avoid them in so far as possible.

5. Mr. BONELL (Italy) said that section C, paragraphs 1 and 2, should be substantially amended or deleted. In particular, the second sentence of paragraph 1 and all of paragraph 2 should be deleted. He disagreed with the representative of Denmark, since in Italy a clear distinction was made between the function of an arbitrator and that of a conciliator or mediator. It was not desirable to confuse the two functions. The situation was different from that in which a court was asked to monitor the implementation of an agreement between

the parties, because in the current case the court would be operating parallel to the arbitration and to the conciliation or mediation.

6. Mr. SHIMIZU (Japan) said that he was opposed to deleting paragraphs 1 and 2 which, like the rest of the Guidelines, contained useful information for the lawyers who would be involved in arbitral proceedings and must be informed of the existence of divergent views on that question. However, those paragraphs could be moved to a different place.

7. Mr. ANDERSEN (Denmark) said that in Denmark, too, a distinction was drawn between the function of arbitration and that of conciliation and mediation. However, just as the courts tried to bring about a settlement between the parties at the first hearing, an arbitration tribunal, after reading all the documents submitted by the parties, could inquire whether they wished to seek a settlement. That procedure could be useful, especially when one of the parties was a government institution which would otherwise have more difficulty in reaching a settlement.

8. Mr. HOLTZMANN (United States of America) said that the fact that paragraphs 1 and 2 were in brackets meant that the purpose of the Guidelines could be fulfilled without them. The question had been considered by the International Arbitration Committee, a group of consultants belonging to the American Arbitration Association, which had decided that paragraphs 1 and 2 should be deleted because, among other reasons, they were not germane to the topic.

9. The drafting group should also be requested to change the title of section C. The preparatory conference should only determine whether any situations existed which might affect the scheduling of the arbitral proceedings, such as the fact that the parties were prepared to reach a settlement or the likelihood that discussions would be held for that purpose. The preparatory conference should not take up the terms of a possible settlement or initiate a conciliation process unless the parties requested it. Yet the title of section C, "Possibility of settlement", suggested intervention by the arbitral tribunal.

10. The reason for not including paragraphs 1 and 2 was that there were very different opinions as to whether it was appropriate for an arbitrator also to act as a conciliator. Practice also varied widely in different parts of the world, and even within different branches of commercial activity in the same country, as in the case of the United States of America. Norms and practice in respect of the function of tribunals also varied in some countries, as the representative of Denmark had pointed out. It might be worth taking into account the ethical standards established some years previously by the American Arbitration Association and the American Bar Association, which held that, while arbitrators should not in principle act as conciliators, they were ethically qualified to do so if both parties requested them to assume that function. That was quite different from coming forward and offering those services.

11. Mr. LEVY (Canada) said that, although he was not opposed to the establishment of working groups when they could carry out a useful function, he felt that if that was done after the Commission itself had expressed its views on the various items, the working group's deliberations would be too restricted.

12. Mr. ZHANG Qikun (China) said that section C should be retained and its application should be left to the discretion of arbitrators in individual countries, since different countries had different judicial systems. In China, the function of arbitrator was combined with that of conciliator, and experience in that area had been satisfactory. In arbitral proceedings the parties were asked whether they wished to attempt conciliation, and if they agreed, the arbitrator could act as a conciliator. If no solution was reached after that, the same arbitrator who had acted as conciliator could resume the role of arbitrator. In his view, it was appropriate for the arbitrators to perform the role of conciliators and not to invite third parties to intervene, since that would also increase the costs. Conciliation offered many advantages, including speed.

13. Mr. TUVAYANOND (Thailand) said that he was in favour of retaining section C, which was useful to avoid the high costs of arbitral proceedings. It was not necessary to go into too much detail; it was sufficient for the arbitral tribunal to ask the parties whether they had held discussions with a view to reaching a settlement and what the result had been.

14. The CHAIRMAN said that the discussion seemed to indicate that section C should be retained; that the drafting of paragraph 1 should be improved while paragraph 2, in brackets, could be deleted; and that there were no problems with paragraph 3.

15. Mr. BURMAN (United States of America) said that at the current meeting there had not been a majority in favour of maintaining section C; at least half the speakers had wanted to delete it. Moreover, his delegation had suggested that, if anything was retained from that section, the title should be changed to give the subject a different focus.

Chapter III, section D, paragraph (i)

16. The CHAIRMAN said that item (i) was one of the most sensitive and important topics on the list, since it was concerned with how to define the points at issue, the possibility of excluding some of them and concentrating on others, and the order in which the issues should be decided.

17. Mr. TUVAYANOND (Thailand) said that in the title of item (i) it would be more appropriate to use the word "identify" than the word "define", in line with paragraph 1 of the remarks. There would be no difficulty in keeping the word "define" in item (ii).

18. The CHAIRMAN said that, considering the stage in the proceedings at which the question arose, it was perhaps more appropriate to use the word "define", as in the document, rather than the word "identify".

19. Mr. HOLTZMANN (United States of America) proposed deleting the final sentence of paragraph 1. He was particularly concerned by the wording "if, however, the facts are largely undisputed and the issues concern law, it might be possible [for the arbitral tribunal] to request that the proceedings be conducted on the basis of documents only". In the early stage of the proceedings, during the preparatory conference - before statements of claim and

defence and, for example, before briefs - it would be impossible for the tribunal to know which facts were largely undisputed or whether the points at issue concerning law were more important than the facts in dispute.

20. Moreover, it would not be proper for an arbitral tribunal to request that hearings should be conducted solely on the basis of documents in cases where the issues were predominantly legal, since arguments on legal issues could be extremely important. The Commission should not support the idea that arguments on legal issues should be handled through written submissions, taking into account, in particular, article 15, paragraph 2, of the Arbitration Rules, which stated: "If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral arguments". It was no accident that the phrase "oral arguments" was included, for 20 years earlier, during the debate on the UNCITRAL Rules, the point had been made that either party ought to be able to request oral argument, which meant oral argument on a legal point, and not only presentation of evidence.

21. Mr. LEVY (Canada) supported the United States proposal. Oral argument, even on strict questions of law, sometimes elucidated or brought out points which had not been mentioned in the written arguments of either party, and the courts always found that very useful. Oral arguments also afforded the arbitrators the opportunity to ask questions about aspects which were unclear.

22. Mr. BONELL (Italy) said that, in view of the considerable differences in that area between the common law and Roman law systems, he could accept a rewording of the final sentence of paragraph 1 so that it would read "If, however, the facts are largely undisputed and the issues concern law, it might be possible to request that the proceedings be conducted prevailingly or predominantly on the basis of documents only".

23. Mr. HOLTZMANN (United States of America) said that he felt as if he was reliving the discussion which had taken place 20 years earlier, when the Commission had decided by consensus that there should not be any bias whatsoever against hearings, on issues of either fact or law, in the event that one party chose such a hearing. It should be borne in mind that the Commission had already stated its position in that regard, both in its Arbitration Rules and in the Model Law. It would therefore have to proceed with extreme caution in introducing drafting changes, and it was not clear that that was ultimately the best solution.

24. Mr. ANDERSEN (Denmark) said he was not sure that the representative of the United States of America was correct in interpreting the provision to mean that the arbitrators were the ones who could request that the proceedings should be conducted on the basis of documents only. Perhaps the parties should be the ones to make that request. In his view, section D was not consistent with the proposal to override article 15 of the Arbitration Rules, which stated that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate". That was the basic rule in any tribunal. If the final sentence of paragraph 1 was interpreted as meaning that the parties could request that the proceedings should be conducted on the basis of documents only, he would not be opposed to retaining it.

25. Mr. BONELL (Italy) suggested stating that, at the request of the parties, the proceedings could be conducted predominantly on the basis of documents.

26. Mr. TUVAYANOND (Thailand) said that item (i) served to define the points at issue between the parties. The reference to the best procedures for resolving the issues, which was a procedural question, was therefore superfluous. And if the current text of paragraph 1 was retained, some sort of safety clause would have to be included to prevent the use of stalling tactics.

27. Mr. SEKOLEC (International Trade Law Branch) said that the provision was aimed at ensuring that the parties focused on the disputed points, without wasting time on methods that were not in dispute or on which agreement could be reached. That was explained in the first two sentences of paragraph 1. The rest of the paragraph was explanatory in nature and, strictly speaking, unnecessary.

28. Mr. ANDERSEN (Denmark) said that the meaning of paragraph 1 would have to be clarified. According to Italy and Denmark, it was the parties that should request that the proceedings should be conducted on the basis of documents only, while the United States construed the text to mean that the arbitral tribunal should ask the parties if they wished the proceedings to be conducted in that manner.

29. Mr. TUVAYANOND (Thailand) said that the arbitral tribunal was supposed to ask the parties whether or not they wished the proceedings to be conducted on the basis of documents only.

30. Mr. SEKOLEC (International Trade Law Branch) said that the parties should be the ones to decide whether a trial should be held or whether the proceedings should be conducted on the basis of documents. Nevertheless, paragraph 1 gave the arbitral tribunal the option of asking the parties if they wished to forgo a trial.

31. Mr. CHOUKRI SBAI (Morocco) said that he was not opposed to the United States proposal to delete the final sentence of paragraph 1. It would, however, be preferable to reword it to indicate that the arbitral tribunal could ask the parties if they wished the proceedings to be conducted on the basis of documents only.

32. Mr. HOLTZMANN (United States of America) said that the Moroccan suggestion could resolve one of the problems which had arisen, as it removed any distinction between issues of fact and issues of law. The current wording of the last sentence of paragraph 1 implied that trials were more necessary in the case of factual issues than of legal issues.

33. However, another problem remained: the fact that the tribunal could ask the parties whether they wished to forego a trial was somewhat prejudicial to them. That could have major consequences if both parties said that they did not wish to hold a trial but the arbitrators wished to interrogate the witnesses or ask questions on issues of law.

The meeting was suspended at 4.35 p.m. and resumed at 5.05 p.m.

Chapter IV, section D, item (ii)

34. Mr. ABASCAL ZAMORA (Mexico) said that paragraphs 6 and 7 should be deleted as they merely offered advice to the parties and bore no relation to the content of the preparatory conference.

35. Mr. BONELL (Italy) said that paragraphs 6 and 7 were superfluous, and risky as well.

36. Mr. CHATURVEDI (India) expressed a preference for retaining the last sentence of paragraph 6.

37. Mr. TUVAYANOND (Thailand) said that paragraph 6 was of some use in that a more specific definition of the relief or remedy sought was necessary.

38. Mr. HOLTZMANN (United States of America) said that whether or not the second sentence of paragraph 6 was applicable depended on when the preparatory conference took place. It would not be applicable if the meeting took place before the presentation of statements of claim and defence. Even if the conference was held at a later stage, it would not be correct to state that the claimant might be uncertain as to the extent of its rights under the applicable law. There was a danger that, under some national legislation, the award could be ultra vires if it exceeded the remedy being sought.

39. Mr. TUVAYANOND (Thailand) said he did not understand how the points at issue could be defined before the statement of claims had been submitted. As to the concept of ultra vires, before knowing what recourse was available, the claimant had to know its rights under the law; paragraph 6 therefore appeared useful.

40. Mr. CHOUKRI SBAI (Morocco) was also in favour of deleting paragraphs 6 and 7. Under Moroccan law, tribunals could rule only on those matters that were brought before them, and it was therefore normal that the statement should specify what the claims were. Allowing the arbitrators to decide what was being sought would contradict a fundamental legal norm. A preparatory conference was the only way for the parties to know what they could do and how they should do it.

41. Mr. TUVAYANOND (Thailand) said that he would not insist on retaining paragraphs 6 and 7, since paragraph 8 was clear.

Chapter III, section D, item (iii)

42. Mr. LEVY (Canada) said that he did not agree at all with the current wording of item (iii). Above all, the first sentence of paragraph 9 touched on a very sensitive issue, in that if the arbitrators expressed an opinion regarding the order in which the issues were to be taken up, the parties might think that they had already formed an opinion on the issue being disputed. For that reason, he wondered whether a sentence warning them of that danger could not be added.

43. Mr. GRIFFITH (Observer for Australia) said that it was inappropriate to refer to the "partial", "interim" or "interlocutory" awards in paragraphs 10 and 11 because those paragraphs dealt solely with determining the order in which the points at issue were to be decided.

44. Mr. ABASCAL ZAMORA (Mexico) said that it was normal in a preparatory conference for the arbitral tribunal to be able to determine the order in which awards should be made. For example, if an arbitral tribunal agreed to follow a certain order and make an award on a question of jurisdiction within a certain period of time, it could run into problems and not have enough time to rule on the main issue.

45. Mr. CHATURVEDI (India) was in favour of retaining paragraph 9, except for the last sentence, which had nothing to do with determining the order in which the points at issue were to be taken up. The first sentence actually had to do with item (i). In fact, a separate paragraph was probably unnecessary since the tribunal would have to decide the order in which the points at issue should be taken up once they had been determined. The problem of paragraphs 10 and 11 was that the award had to be unique and final, while the rest would be partial, interim and interlocutory orders. Accordingly, the idea of limiting the award seemed inadequate.

46. Mr. TUVAYANOND (Thailand) said that regardless of how important it might be to determine the order in which the points at issue were taken up, paragraphs 10 and 11 seemed unnecessary to him; granting the arbitrators the power foreseen in them could even be dangerous.

47. Mr. BONELL (Italy) was in favour of retaining paragraphs 9, 10 and 11, although perhaps with some modifications. He believed that one of the principal objectives of a preparatory conference was to establish the order in which the points at issue should be taken up when they did not all have to be decided together, and to inform the parties of that order, at least to the extent that the tribunal considered appropriate.

48. Mr. HOLTZMANN (United States of America) said that, in his opinion, determining the order in which the points at issue should be taken up was related to whether some issues should be considered preliminary, such as jurisdiction or the applicable law, for example. Indicating the order in which non-preliminary issues should be taken up could suggest that the tribunal would tell the parties how they ought to defend their case. It was incumbent upon the tribunal to show extreme caution and not to influence the judgement of the claimant's attorney. As to the text of paragraphs 10 and 11, it was not enough to instruct or advise the arbitrators what to do if they felt an issue was preliminary. Regarding the disagreement about whether or not there were partial, interim or interlocutory awards, he recalled that paragraph 1 of article 32 of the UNCITRAL Arbitration Rules used the same terminology.

49. Mr. TUVAYANOND (Thailand) said that it was not simply a matter of determining whether one question was preliminary to another, since it could also be useful to establish an order of priority for the other issues, separating the main ones from those that were secondary. If the arbitral tribunal resolved the main issues, the parties might decide not to proceed with those remaining, for

reasons of time or economy. Consequently, the tribunal had to be allowed to determine, in consultation with the parties, the order of priority of the various issues.

Chapter III, section E

50. Mr. HERRMANN (Secretary of the Commission), supported by Mr. BONELL (Italy), recalled that, according to the introduction to the draft Guidelines (para. 39), the list of topics contained in sections A to T was intended to be as complete as possible, in order to cover all the points that an arbitral tribunal could include in the agenda of a preparatory conference. As a preparatory conference did not have to be held at the same stage of the arbitral proceedings (para. 29), and the stage at which it was held would influence the scope of its agenda (para. 30), it could not, generally speaking, be premature to consider certain kinds of questions at a preparatory conference, nor should that lead to a deletion or modification of the content of the draft Guidelines. It would be sufficient to state, with reference to all the topics included in the draft, that the tribunal should determine in each case whether at a given stage in the arbitral proceedings for which the preparatory conference was being held it was inappropriate or impractical to consider a specific topic.

51. Mr. HOLTZMANN (United States of America), supported by Mr. CHATURVEDI (India), said that paragraph 3 of section E should be deleted, inasmuch as it could be viewed as constituting a threat to the parties that the arbitral tribunal might say in the preparatory conference that the refusal without reason by one of them to admit a fact advanced by the other would be taken into account in apportioning the costs of the arbitration. While the tribunal was not precluded from taking the fact into account later on, announcing that beforehand would amount to coercion.

52. As to the suggestion made by the Secretary of the Commission, the considerations the latter had raised could be worded not only in a general way, but also in relation to specific items.

53. Mr. GRIFFITH (Observer for Australia) concurred with the view that paragraph 3 should be deleted or, in any case, revised in such a way as to remind the parties of the arbitral tribunal's authority in respect of the costs of arbitration and to indicate that such authority could be exercised if it was determined that the refusal to admit specific facts had been unreasonable.

The meeting rose at 6.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 538th MEETING

Held at Headquarters, New York,
on Monday, 13 June 1994, at 10 a.m.

Chairman: Mr. MORAN (Spain)

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94-80972 (E)

The meeting was called to order at 10.15 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396 and Add.1)

Chapter III

Section E (continued)

1. The CHAIRMAN, replying to a question raised by the representative of Thailand, said that paragraph 3, in brackets, was highly controversial and would therefore probably be deleted.

Section F

2. Mr. GRIFFITH (Observer for Australia) said that a basic principle of common law held that, in judicial proceedings, documentary evidence produced by the parties during the "discovery" process should enjoy a certain degree of confidentiality in that it could only be used in the case at hand and could not be divulged. However, according to a decision rendered in a recent case in Australia, such protection did not extend to evidence submitted in arbitral proceedings. Many arbitration rules, including those of UNCITRAL, did not address the issue of confidentiality of evidence or testimony. Bearing in mind that it was precisely the confidential character of arbitration that was often a determining factor in the choice of that procedure, it would therefore be desirable for the Guidelines to deal, either in section F of the check-list or elsewhere, with the question of confidentiality.

3. Mr. HERMANN (Secretary of the Commission) said that the secretariat had already anticipated that point. There was growing interest in the question of confidentiality, as the conclusions drawn during the preparation of the new World Intellectual Property Organization arbitration rules showed. It remained to be seen how the question should be addressed in the Guidelines. Suggestions from delegations on that topic would be welcome, even after the session.

4. Mrs. VERDON (Canada) said that during the consultations that had taken place in Canada regarding the Guidelines it had been pointed out that the question of disclosing confidential information was always a sensitive one, particularly since, under the laws of certain countries, confidentiality could no longer be invoked once information had been disclosed. It would thus be appropriate to include the question in the Guidelines, preferably in section F.

5. Mr. HOLTZMANN (United States of America) also felt that the check-list should include an item that would allow the parties to obtain information on the extent of confidentiality. A good example in that respect was article 20 of the UNCITRAL Arbitration Rules. It would also be better to use a word like "arrangement" in paragraphs 4 and 5 to avoid having to deal with matters of simple and irrebutable presumptions.

6. The penultimate sentence of paragraph 11 should be deleted, as it gave the impression that the Commission was not in favour of disclosing purely internal

documents. Actually, internal documents such as the minutes of a meeting of a board of directors on a specific contract or lists of shareholders in cases where a person's shareholder status was being contested could be extremely important. The party that did not have access to them would have to be able to find out about them, which frequently would not be facilitated by their transmission to a third party. Finally, he saw a need to revise the final phrase in paragraph 13, which alluded to the risk of self-incrimination, a concept which by definition dealt with criminal rather than civil law.

7. Mr. SEKOLEC (International Trade Law Branch) explained that the conditions listed in paragraph 11 had been largely inspired by the International Bar Association's rules on production of evidence, which had been drawn up taking the standard practices of various legal systems into account. In that text, the condition concerning internal documents was imperative, barring all requests for communication of such documents, where paragraph 11 allowed for the possibility of leaving the decision up to the arbitral tribunal.

8. The CHAIRMAN felt that the text represented a happy medium and took into account the rules in effect in different systems regarding disclosure.

Section G

9. Mr. HOLTZMANN (United States of America) said he hoped that the secretariat would revise the final sentence of paragraph 3, as it was not clear whether it implied that employees could be heard as witnesses during an inspection.

Section H

10. Mr. HOLTZMANN (United States of America) said that the final sentence of paragraph 3, perhaps also inspired by the International Bar Association's rules of evidence, which were very flexible on that point if taken as a whole, strongly resembled a recommendation. The decision to take oral evidence must be left entirely to the parties. The Commission had to be absolutely neutral on that point, the best course being not to mention it at all. However, it could be prominently included in future guidelines on submission of evidence. In other words, either the topic should be discussed in greater detail or the sentence should be deleted entirely.

11. Mr. RENGER (Germany) sought further clarification of paragraph 6, and especially on the various possible solutions.

12. Mr. SEKOLEC (International Trade Law Branch) explained that the solution mentioned in paragraph 6 was the simplest, since it stayed within the framework of arbitral proceedings. The other solutions were based on certified written statements and thus required the involvement of external institutions.

13. Mr. CHOUKRI SBAI (Morocco) stressed that the solution mentioned in the last sentence of paragraph 6 was unknown in certain legal systems. In his country, for example, the oath was a sine qua non of evidence and could be dispensed with only in very exceptional cases. The sentence should therefore be reworded to say, for example, that the parties would agree to have the witnesses sign a

written statement certifying the veracity of their testimony, or that the arbitral tribunal could propose that solution to the parties.

14. Mr. HOLTZMANN (United States of America) said that the representative of Morocco had put his finger on a problem that had to be taken into account in the Guidelines, i.e. the great diversity from one country to another of procedures for authenticating written statements, certifying signatures and taking oaths. It was therefore important that the arbitrators should be certain at the preparatory conference stage that the parties knew exactly what formalities had to be observed when written statements were submitted. It would also be useful to have more information about the way oath-taking was administered in connection with oral testimony by witnesses.

Section H

15. Mr. HOLTZMANN (United States of America) said that the secretariat had made a commendable effort under item (ii) to provide an overview of the rules for the production of evidence around the world. It was, however, an overly ambitious task that threatened to create more problems than it solved. For the purposes of the check-list, it was enough to try to decide how the parties and the arbitrators intended to take oral evidence from witnesses instead of proposing six or seven different methods. Paragraphs 8 to 12 could therefore be dispensed with.

16. Mr. BONELL (Italy) agreed in part with the representative of the United States of America, but thought that he went too far. Only paragraphs 8 and 9 needed to be deleted, as paragraphs 10 to 12 had their own practical importance.

17. Mr. HOLTZMANN (United States of America), referring to the first sentence of paragraph 15, noted that in many legal systems, particularly in the United States, the persons involved in the settlement of a dispute were treated in exactly the same way as any other witnesses. He suggested, therefore, that the phrase "it is widely held that" should be deleted, unless there was another way to restore the necessary balance to the paragraph.

Section I

18. The CHAIRMAN said that, in the absence of any comments on that section, he would take it that the Commission wished to approve it.

Section J

19. Mr. HOLTZMANN (United States of America), referring to paragraph 2 under item (i), said that while it was appropriate to ask the parties what materials they intended to submit and when, it was not appropriate to address the content of those submissions, as mentioned in the paragraph. The UNCITRAL Arbitration Rules, along with nearly all others, left that issue to the discretion of the parties. The only rules that went into detail even to the slightest degree, those of the International Centre for Settlement of Investment Disputes, did not go nearly as far as paragraph 2.

20. The Guidelines also should not discuss the advantages and disadvantages of simultaneous or consecutive submission of materials, as mentioned in paragraph 5, under item (iii). Everything depended on the circumstances of the case, and it was better to allow the arbitral tribunal to decide for itself.

Section K

21. Mr. GRIFFITH (Observer for Australia) said that the remarks in that section appeared to be included under the heading "Agenda". The actual remark itself was of no interest and should be deleted. All that should be retained under the "Agenda" heading was: "Consider some practical details concerning writings and exhibits". The rest of the text would appear under the "Remarks" heading.

22. Mr. HERRMANN (Secretary of the Commission) explained that the section entitled "Agenda" had been considerably expanded because a proposal had been made to issue a separate brochure containing only the agenda items. "Consider some practical details concerning writings and exhibits" would thus be inadequate. If the proposal to issue such a brochure was not retained, there would be no problem in proceeding as the observer for Australia had suggested.

23. Mr. GRIFFITH (Observer for Australia) said he believed that it would indeed be wise to present separately the contents of the Guidelines, meaning the items themselves and some remarks directly related to them, along with the comments of a more general nature which were currently scattered throughout the text.

24. Mr. HERRMANN (Secretary of the Commission) said that what he had described was not exactly what the observer for Australia had in mind. The case he had mentioned would involve retaining the Guidelines in their current form and issuing a separate brochure several pages long containing a brief introduction and the items appearing under the heading "Agenda". Both that idea and that of the observer for Australia deserved further consideration.

25. Mr. GRIFFITH (Observer for Australia) said that the two proposals actually sought to address the same concern: that the essentials should be collected and presented clearly. His own proposal led him to withdraw his remark concerning section K. Perhaps it would be better to expand the "Agenda" headings in order to give an overview of the content of the Guidelines.

Section L

26. Mr. GRIFFITH (Observer for Australia) drew the attention of the secretariat to the fact that the issue of confidentiality, which had been raised in connection with submissions, applied also to hearings.

27. Mr. ABASCAL ZAMORA (Mexico), referring to paragraph 2, in brackets, said that his delegation found the paragraph acceptable with the exception of the second sentence, which invited the arbitrators to indicate to the parties at the hearing the strengths and weaknesses of their respective cases. That was very dangerous advice, and the sentence should be deleted.

28. Mr. HOLTZMANN (United States of America) also believed that it would be entirely premature for the arbitrators to give their opinion as to the strengths

and weaknesses of the parties' cases at the hearing stage, except perhaps when the three arbitrators agreed that the presentation of an argument which was irrelevant, in their view, would be a waste of time. Such a scenario was highly improbable, of course, because the arbitrators would not have an opportunity to consult among themselves during the hearing, and it would be completely inappropriate for them to consult before having heard the parties. At any rate, that question had not been addressed in the Guidelines, which were supposed to offer recommendations on what to do at a preparatory conference and not at a hearing. That comment applied not only to the second sentence but to all of paragraph 2, which should be deleted along with paragraph 5 for the same reasons.

29. In paragraph 7, the Guidelines recommended that the dates of hearings should not be fixed until the written submissions had been received. While that was probably justified in some situations, in others it could be important to fix the dates so that the parties could organize themselves accordingly. There again, it was evident that it would be preferable for the Guidelines to limit themselves to the essentials without trying to tell the arbitrators how they ought to conduct the arbitral proceeding. The fewer issues raised that could lend themselves to controversy in practice, the greater the chances that the Guidelines would be widely accepted.

The meeting was suspended at 11.40 a.m. and resumed at 12.25 p.m.

30. Mr. CHATURVEDI (India) agreed with the representative of the United States of America that the issues raised under items (i), (ii) and (iii) were premature. No answer could be given to the first two unless the proceedings ran their course and it was deemed necessary to impose such deadlines. As for knowing the order in which the parties would make their oral presentations (item (iii)), paragraph 11 rightly stipulated that it was for the claimant to make his opening statement, after which the defendant was called upon to present his rebuttal.

31. His delegation also did not agree with the second sentence of paragraph 2, which stated that the hearing offered the arbitral tribunal an opportunity to indicate to the parties, in a fair and impartial manner what, in the view of the tribunal, were the strengths and weaknesses of their cases, because that was not one of the duties of an arbitral tribunal, any more than was the idea, expressed in the last sentence of paragraph 5, that the arbitral tribunal could assist in the narrowing of issues by giving the parties its assessment of the argued issues.

32. Mr. KOUVSHINOV (Russian Federation) said that, although he did not doubt that the Guidelines under consideration would be of great practical use, especially in the arbitration of particularly complex matters, on reading them, he had the impression that they were intended for proceedings of a legal nature. Commercial arbitration should be a flexible procedure that could be adapted to the settlement of various types of disputes. He feared that the Guidelines might lead to a kind of legal formalism.

33. Mr. HOLTZMANN (United States of America) was pleased that paragraph 13 noted that the examples given were in no way obligatory or exhaustive. He

questioned the usefulness of paragraphs 11 and 12, however, which, in his view, were neither necessary nor strictly accurate. The purpose of the Guidelines was to point out to parties that it was desirable to establish the order of the various phases of the proceedings, not to tell the arbitrators how they were supposed to exercise their discretionary power, because many factors entered into such a decision. It should therefore be left to the arbitral tribunal, after consultation with the parties, to choose the procedural pattern to be followed, without spelling out in detail the various steps that the arbitral tribunal and the parties might wish to take.

34. His delegation's doubts as to some of the examples contained in paragraphs 11 and 12 had to do with the fact that one of the reasons often given for not enforcing awards made under the New York Convention and various domestic laws was that the defendant had not been allowed to present its arguments. Care should be taken, then, when speaking of hearings and witnesses, not to cite the current Guidelines in enforcement proceedings in support of the notion that one party had not been given an opportunity to present its defence.

35. Mr. CHATURVEDI (India) said that he favoured retaining paragraph 11, which he considered to be appropriate. The idea of considering whether hearings should be held, stated in the chapeau to section L, was unfounded, since hearings were almost inevitable. The chapeau should therefore be reworded.

36. Mr. ABASCAL ZAMORA (Mexico) said he fully agreed with the representative of the United States of America that paragraphs 11 and 12 were misleading and appeared to reflect the opposite of the flexibility arbitral proceedings were supposed to have, not to mention the fact that they could compromise the enforcement of an arbitral award by giving the impression that one of the parties had not been given an opportunity to present its arguments.

37. Mr. KOUVSHINOV (Russian Federation) said that, while he agreed with the representative of India that arbitral proceedings must involve hearings, he thought that the arbitral tribunal could be flexible; one could not exclude the possibility that the parties might reach an amicable settlement before the proceedings actually began. There would then be no need for hearings, and the arbitrators would simply be informed that the parties had reached an agreement.

38. Mr. HOLTZMANN (United States of America) said that paragraphs 14 and 15 (item (v)) were somewhat problematic in view of the wide range of practice that existed in the submission of notes to the arbitral tribunal. Although it was possible under certain legal systems for the parties to submit to the tribunal, either at the outset or at the end of their oral statements, notes summarizing their arguments and listing in detail the cases cited by the party concerned, such notes occasionally went so far as to cite cases which had not been mentioned or heard during the hearing or which the other party was hearing about for the first time.

39. That led him to wonder whether the parties ought to be allowed to submit such notes, particularly at the end of a hearing, since the other party was thus deprived of an opportunity to comment thereon, giving rise to the problem of unequal treatment of the parties.

40. What was more, the notion that such notes could be submitted after the hearing seemed to contradict article 29 of the UNCITRAL Arbitration Rules, which stipulated that the arbitral tribunal could, after ascertaining that the parties had no further submissions to make, declare the hearing closed. However, the closing of the hearing in itself posed the problem of its reopening as well as a whole series of related questions.

41. For that reason his delegation proposed that the wording of paragraphs 14 and 15 should be simplified.

42. Mr. CHATURVEDI (India) said that he fully endorsed paragraph 11, since the submission of notes seemed to him to be a means of facilitating the work of the arbitrators, and it was in any case permissible for the other party at the hearing to submit a réplique. In paragraph 15, the word "speeches" should be replaced by the word "arguments", which was more accurate.

43. As to the proposed wording of the third sentence of paragraph 17, under item (vi), which indicated that the presiding arbitrator could also consecutively dictate to a typist a summary of oral statements, his delegation questioned the practicality of such an arrangement, since in practice typists attended the hearings and took notes throughout.

44. Mr. KOUVSHINOV (Russian Federation), recalling that the Commission was still dealing with the preparatory conference phase, said that the essence of item (vi) was not so much determining whether notes could be submitted as it was determining whether it was permissible to analyse the arguments and transcripts produced. In his view, the Commission should limit itself at present to the checking of transcripts.

Section M

45. Mr. ABASCAL ZAMORA (Mexico) said that he had found a major translation error in the Spanish text, which referred to the language or languages to be used in the hearings, whereas the English version, for example, correctly referred to the language or languages to be used in the proceedings. In addition, his delegation did not agree at all with the idea expressed in the first sentence of paragraph 2 that it might be useful to consider at the preparatory conference the extent to which the agreement of the parties or the determination by the arbitral tribunal was to be applied. In fact, the language of the proceedings was determined either jointly by the parties or, failing that, by the arbitral tribunal, which was empowered to conduct the arbitral proceedings as it deemed appropriate, provided that the principle of equality of the parties was respected and both parties were given an opportunity to present their arguments.

46. Mr. HOLTZMANN (United States of America) wondered whether, in the light of the statement by the representative of Mexico, the meaning of paragraph 2 had been accurately rendered in the English text as well. That paragraph stated that, apart from the manner in which the choice of language was made, emphasis should be placed on the scope or extent of the agreement - in other words, on whether or not all the documents submitted must be in the language of the

proceedings and the agreement. Consequently, the English text should also be made more specific.

47. Mr. BONELL (Italy), pursuing the idea raised by the representative of the United States of America, said that the whole text should be improved since the provision was an important one which often gave rise to many problems.

48. Mr. ILLESCAS (Spain) agreed with the representative of Mexico that the Spanish text wrongly limited the scope of the agreement to the language of the hearings. The text should state clearly that what had to be done was, first, to settle the matter of the language to be used in the proceedings as a whole and, subsequently, to determine who should make that choice, something that was clearly not apparent from paragraphs 1 and 2 of the Spanish text and even less from the English text. That part of section M could thus stand to be reviewed. Also, paragraphs 1 and 2 had too didactic a tone which was out of place in a text intended for experts. In any case, those paragraphs were unnecessary.

49. Lastly, in addition to the relevant example of one specific problem in paragraph 2, the main problem raised was determining whether the language of the proceedings had to be decided at the outset and who was to take that decision.

50. Mr. AL-NASSER (Saudi Arabia) pointed out that the language of the proceedings was of particular importance given that the weaker party in a dispute was likely to be placed at a disadvantage by his poor command of the language of the proceedings. His delegation would prefer that the language of the proceedings should be that of the dispute, unless the parties agreed otherwise. The point of departure should be the language of the disputed transaction or, failing that, a language chosen by the parties.

51. The CHAIRMAN asked the representative of Saudi Arabia to clarify what he meant by the language of the dispute.

52. Mr. AL-NASSER (Saudi Arabia) replied that he meant the language in which the contract that was the subject of the dispute between the parties had been drafted.

The meeting rose at 1.05 p.m.

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Thirty-seventh session

SUMMARY RECORD OF THE 539th MEETING

Held at Headquarters, New York,
on Monday, 13 June 1994, at 3 p.m.

Chairman: Mr. MORAN (Spain)

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The meeting was called to order at 3.15 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section M

1. Mr. HOLTZMANN (United States of America), supported by Mr. GOH (Singapore), recalled that during the drafting of the Arbitration Rules, UNCITRAL had fully discussed the question of the language of arbitral proceedings, and that the appropriate guidelines were set out in article 17 of the Rules. The secretariat might therefore wish to bear the provisions of article 17 in mind when that section of the draft was revised.

2. Another source of concern for his delegation was the order of certain topics on the list. In the UNCITRAL Arbitration Rules and Model Law, the order of topics was somewhat different from the one followed in the check-list of possible topics for preparatory conferences. Language, for example, was a topic which appeared much earlier in the Rules, well before such topics as witnesses, hearings and written submissions. In the interest of clarity and to facilitate the search for rules, the secretariat might consider following the same general order as that of previous UNCITRAL documents.

Chapter III, section N

3. Mr. HOLTZMANN (United States of America) suggested that in preparing the revised version of the draft, the secretariat might mention the fact that administrative support was often provided by arbitral institutions. There was a broad network of such institutions throughout the world, and it must be recognized that they operated not only independently, but in cooperation with one another.

Chapter III, section O

4. Mr. KOUVSHINOV (Russian Federation) said that some legal systems had another office in addition to that of secretary or registrar, called rapporteur in Russian. That person played an active role in keeping the arbitrators informed of the substance of the matters under consideration.

5. The CHAIRMAN suggested that the representative of the Russian Federation should tell the secretariat which term he considered most appropriate or what the duties of the person occupying the position to which he had referred were.

Chapter III, section P

6. The CHAIRMAN noted that paragraph 2 was in square brackets, which indicated that the secretariat had left it to the Commission to determine whether it should be included in the document.

7. Mr. HOLTZMANN (United States of America) said that the purpose of paragraph 2 was to provide the arbitral tribunal with instructions concerning

the factors which it should take into account. It was not necessarily a topic for the preparatory conference, but sought to inform the arbitral tribunal of what it ought to do or of considerations it might take into account after a preparatory conference or as the result of one. Such general instructions were unnecessary in the document under consideration. Furthermore, the order in which factors were listed, from (a) to (g), seemed to suggest that some were more important than others. For example, the question relating to the enforcement of awards was mentioned last, perhaps because enforcement was the last stage in the chronology of events; in any case, that placement tended to give the impression that there was an order of importance. The simplest solution was to delete paragraph 2 entirely.

Chapter III, section Q

8. Mr. BONELL (Italy) proposed that the section should be deleted from the check-list. In the first place, he did not see the purpose of paragraphs 1 to 3 under item (i). If the arbitral tribunal sought the views of the parties, which would be surprising at such an early stage, either both parties might refuse to reply, which would make the arbitrators feel uncomfortable, or else they might begin to argue. He also wondered what would happen if one of the parties gave incorrect information or refused to disclose certain information.

9. Although he did not reject point (ii) quite so categorically, he did believe it was a question which the arbitrators should decide or, as was the case under the legal system of some countries, it might be something that should be left entirely to the discretion of a particular party. He would therefore prefer that item Q should not be included in the check-list.

10. Mr. ABASCAL ZAMORA (Mexico) suggested that section Q should be deleted from the check-list. Mandatory provisions did exist, and it was up to the arbitrators to obtain knowledge of and interpret them. The task referred to in item (ii) was the responsibility of the parties. The mandate of the arbitrators terminated when they made an award, and it generally was the responsibility of the parties to file the award in places where such a requirement existed. To suggest otherwise might encourage inexperienced arbitrators to take that step, when in reality those responsibilities did not arise until after the award was made.

11. Mr. HOLTZMANN (United States of America) said that he, too, had reservations regarding the paragraphs under item (i) and would not object to their deletion, although he would prefer to retain item (ii). In some countries the arbitral tribunal itself was required to register the award. Accordingly, if arbitrators from other countries were involved in arbitral proceedings in a place where the requirement existed, it was important to think about what would happen if those arbitrators were not told about it; would they be allowed to hire lawyers to find out such information, and who would pay the costs of registering the award or of translating it if a translation was required for registration purposes? Those were questions which would be very difficult to resolve at the end of the proceedings and which therefore should be clarified at the outset. To sum up, his delegation favoured retaining (ii) in section Q, which would require amending the title of the section, a task that could be left to the secretariat.

Chapter III, section R

12. Mr. ABASCAL ZAMORA (Mexico) suggested that it might be better if section R formed a separate chapter of the draft Guidelines - chapter IV, for example - and contained information along the lines of that contained in the current section, which should be borne in mind in multi-party arbitration.

13. Mr. HOLTZMANN (United States of America) said that multi-party arbitration was an extremely complex issue, and he commended the secretariat for having handled it quite well. However, some parts in which the arbitrators were told how to proceed should be deleted, since those issues ought to be resolved in accordance with the circumstances of individual cases and deferred until there was greater consensus in the arbitration community as to how such cases should be handled.

14. In paragraph 4, the first sentence should be retained and the remainder of the paragraph deleted. In addition to creating problems similar to those already indicated, paragraph 6 seemed to suggest in its final sentence that a party did not have to be present at some of the hearings. When an arbitration involved more than two parties, UNCITRAL should avoid any suggestion that it was not entirely up to the parties to decide whether they wished to be present or not. In summary, subject to those two deletions, his delegation approved section R.

15. Mr. GRIFFITH (Observer for Australia) said that it might be better to include paragraphs 1, 2 and 3, which were helpful in defining the main characteristics of a multi-party arbitration, in the introduction to the draft Guidelines. He also suggested that the secretariat should consider the impact which multi-party arbitration might have on other parts of the document, such as section F, on documentary evidence.

Chapter III, section T

16. Mr. ABASCAL ZAMORA (Mexico) said that there was something missing in the draft Guidelines, since no reference was made to the admissibility or evidentiary effect of instruments transmitted by means of electronic data interchange (EDI) or other similar methods. That issue would arise with increasing frequency in international arbitration, given the growing use of EDI. The secretariat should take into account the results of the work of the Working Group on Electronic Data Interchange in order to incorporate them in the Guidelines where appropriate.

17. Mr. HOLTZMANN (United States of America) said that he fully agreed with the representative of Mexico regarding the need to take into account the impact of electronic data interchange. Another matter which should perhaps be included in the Guidelines had to do with communication between the parties and the arbitral tribunal. The parties might be uncertain as to the most appropriate ways of communicating with the tribunal, particularly in cases involving special arbitration or where the arbitral institution did not have an established procedure. It would be helpful if one of the topics of the preparatory conference that the arbitrators and the parties could jointly discuss was the most appropriate way of communicating with one another.

18. Mr. CHOUKRI SBAI (Morocco) brought up an issue which arose in the legislation of his country, namely, situations in which the death, withdrawal or illness of an arbitrator terminated an arbitration unless the agreement between the parties provided otherwise or they agreed that it should continue.

19. Mr. SEKOLEC (International Trade Law Branch) said that the matter normally was resolved by the arbitration rules being applied; it was therefore unnecessary to include it in the draft Guidelines.

20. Mr. JONKMAN (Observer for the Permanent Court of Arbitration) said that he would recommend to his organization and to arbitrators that they should use the Guidelines as soon as they were issued. He felt that they could prove quite useful, not only because the provisions governing an arbitration were usually inadequate, but also because arbitrators generally were not very experienced with international arbitration.

21. The CHAIRMAN said that before moving on to the next item on the Commission's agenda he wished to know the Commission's views on how to proceed in the future with regard to the draft Guidelines. It had already been agreed that the secretariat would compile the results of the initial discussion and consolidate them later on with those of the Congress of the International Council for Commercial Arbitration (ICCA) to be held in Vienna in November 1994. The Commission might wish to decide at the current stage whether those results should be reviewed by a working group or perhaps by a group of experts which would meet during the first quarter of 1995, before they were submitted to UNCITRAL at its twenty-eighth session, which would probably be held in Vienna in May 1995.

22. Mr. BURMAN (United States of America) said that in view of the positive outcome of the current debate, his delegation had changed its mind and believed that it might be useful to convene a working group to consider the draft Guidelines prior to the Commission's twenty-eighth session in order to help UNCITRAL complete its consideration of the item. However, before a decision was taken, it must be borne in mind that UNCITRAL might have before it at its next session two documents which required priority attention, one relating to independent guarantees and the other to electronic data interchange. Consequently, the best course of action would seem to be for the secretariat to consolidate the results of the current debate with those of the forthcoming ICCA Congress, perhaps with the help of a group of experts, and for the Commission to decide in 1995, in the light of its workload, whether to convene a working group to accelerate consideration of the draft Guidelines.

23. Ms. VERRALL (United Kingdom) endorsed the United States proposal, since she did not feel it was necessary to convene a working group before the Commission's twenty-eighth session. The secretariat could convene a working group immediately following the November Congress of the International Council for Commercial Arbitration and consolidate the results in a document which it would transmit to delegations sufficiently in advance for them to be able to consider it thoroughly before the twenty-eighth session.

24 The CHAIRMAN suggested that, after considering the document to be prepared by the secretariat, delegations should send their written observations to

facilitate its later work, particularly with regard to the various language versions of the text.

25. Mr. BONELL (Italy) said it was unfortunate that only a few delegations, including his own, wanted the Commission to take a decision on the procedure to be followed in the future regarding the draft Guidelines. He disagreed that it was not the right time to take a decision, and he did not think that the future of the text should be made contingent on the results of the work of other forums, such as ICCA, perhaps consolidating them through an informal working group. It would be far more appropriate for the Commission itself to take a decision on the matter.

26. Mr. RENGER (Germany) said that the Commission should not spend additional time on a second review of the Guidelines or try to turn itself into a drafting group, since it was not drawing up a legal instrument. Agreement had already been reached on the principles, and the Commission should be able to conclude its consideration of the item at its next session.

27. Mr. CHOUKRI SBAI (Morocco) said he was pleased that ideas and opinions from different legal systems had been expressed in the Commission. Since it was not a legislative body, the Commission should endeavour to reach compromises, which would benefit those who used arbitration.

28. The CHAIRMAN said that it was up to the secretariat to decide whether to convene a group of experts in order to facilitate and expedite the Commission's work at its next session. He added that the Commission had concluded its consideration of the agenda item.

The meeting rose at 4.25 p.m.